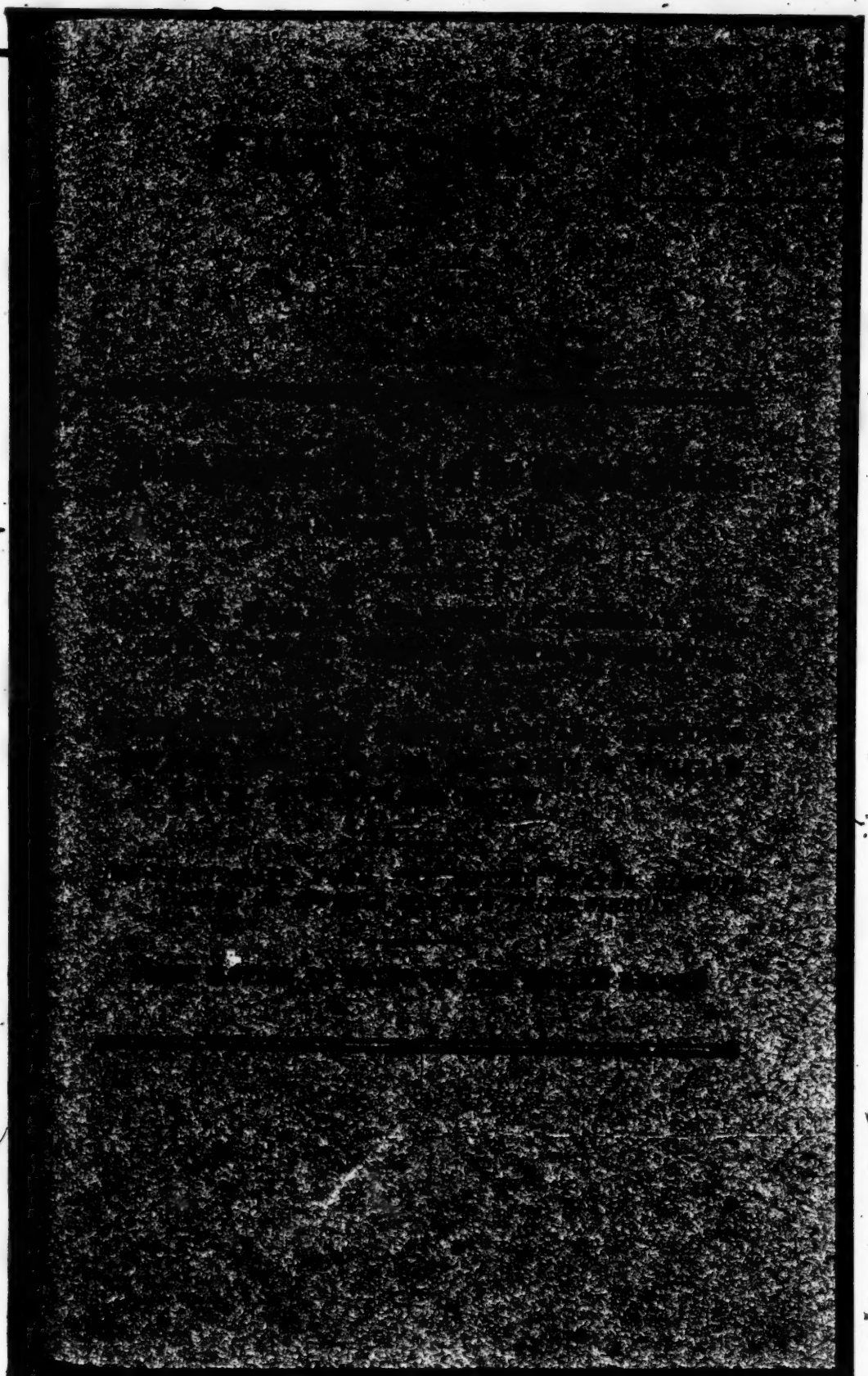

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 721

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Twelfth District, appellant (below)

v.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR of the Last Will and Testament of William B. Lewis, etc., appellee (below)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD

Now come David W. Phillips, Collector of Internal Revenue, Twelfth District, and Dime Trust & Safe Deposit Company, Executor of the last will and testament of William B. Lewis, appellee in this cause in the United States Circuit Court of Appeals for the Third Circuit, now pending in this Court on questions certified by the said Circuit Court of Appeals, and move that this Honorable Court issue its writ of certiorari commanding that court to certify and send to this Court the entire record in this

cause, in order that this Court may consider and decide the whole matter in controversy as upon appeal pursuant to Section 239 of the Judicial Code as amended by the Act of February 13, 1925, and Rule 37 of the Rules of this Court.

A certified transcript of the record in this case and nine printed copies thereof have been lodged with the Clerk of this Court as exhibits to this motion.

This was an action commenced in the United States District Court for the Middle District of Pennsylvania by Dime Trust & Safe Deposit Company, executor of the last will and testament of William B. Lewis, against David W. Phillips, Collector of Internal Revenue, Twelfth District, to recover certain sums paid on account of the federal estate tax assessed against said executor and paid by it under protest. From judgment in favor of the plaintiff the Collector duly appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court by certificate filed February 11, 1931, has certified to this Court the following questions:

> 1. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

2. Does section 302 of the revenue act of 1924 require that the value of property held by husband and wife as tenants by the entirety, acquired prior to the effective date of that Act but after the effective date of the revenue act of 1916, be included in the gross estate of the tenant first dying for the purpose of the Federal estate tax?

3. If the answer to either question be in the affirmative, had the Congress power to extend the cited taxing provision to such an estate so acquired?

It is thought that the entire record will offer to the Court assistance in its decision which is not available in the certificate alone, for the reason that the certificate does not show the exact findings in regard to the various items of property held by the decedent and his wife as tenants by the entirety. The Court may desire to know the exact situation disclosed by the record in regard to these matters, and counsel feel that they will be able to present the case more satisfactorily upon the record than upon the certificate. The questions which the case involves are of importance to the Government and to numerous taxpayers, and the possibility of further litigation in regard to the exact points which arise should be avoided by final determination in this Court of the whole controversy.

The case was tried before the District Court upon written waiver of jury trial, and the court found the facts to be those which had been stipulated by the parties. The stipulation, together

with parts of the plaintiff's statement of claim in the District Court which are incorporated therein by reference, occupies about seven printed pages of the record. The rest of the record consists of the pleadings, the opinion of the court, the judgment, and the papers used in connection with the appeal. If the records sent up, the Court will not be compelled to examine any testimony, but will be in a position to interpret and answer the questions in view of the exact state of the record rather than upon the rather meager statement of facts made by the court in its certificate.

Wherefore, the parties hereto jointly pray that this Honorable Court issue its writ of certiorari commanding the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court the entire record in this case in order that this Court may consider and decide the whole matter in controversy as upon appeal.

DAVID W. PINNER,
Collector of Internal Revenue,
Twelfth District.

By THOMAS D. THACHER, *Solicitor General.*

DUKE POWER & SAFE DEPOSIT COMPANY,
Executors of the last will and testament
of William B. Leidy, etc.,

By CHARLES H. LEAVY, *Attorney.*